Supreme Court of the United States

JANET T. HAMILTON, ADMINISTRATRIX OF THE ESTATE OF FRANK ESKEL HAMILTON, DECEASED,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 6

CONCLUSION 10

APPENDIX

Opinion of Fourth Circuit Court of Appeals ..... App. 1

Opinion of the Trial Court ..... App. 1

Charges of the Court ..... App. 3

Objections of Petitioner ..... App. 14

TABLE OF CITATIONS

State Cases

Edison v. Atchison, Topeka and Santa Fe Railway Company, 453 P.2d 204 (1969) 6

Parker v. Atchison, Topeka and Santa Fe Railway Company, 70 Cal. Rptr. 8 (1968) 6

Federal Cases

Page

DeLima v. Trinidad Corporation, 302 F.2d 585 (2nd Cir. 1962) 6, 9

Ely v. Reading Co., 424 F.2d 758 (3rd Cir. 1970) 6

Hausrath v. New York Central Railroad Company, 401 F.2d 634 (6th Cir. 1968) 6, 8

Hoyt v. Central Railroad, 243 F.2d 840 (3rd Cir. 1957) 6, 9

Page v. St. Louis Southwestern Railway Company, 312 F.2d 84 (5th Cir. 1963) 6, 8, 9

Stacy v. Sea Drilling Corp., 424 F.2d 1272 (5th Cir. 1970) 6

Tyree v. New York Central Railroad Company, 382 F.2d 524, 529 (6th Cir. 1967) cert. denied 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967) 6

Supreme Court Cases

Crane v. Cedar Rapids and Iowa City Railway, 395 U.S. 164, 166, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969) 8

Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) 7, 8

Statutes

45 U.S.C.A. Section 51 Federal Employers' Liability Act, page 150..3, 7

28 U.S.C. Sec. 1254 (1) 2

Other Authority

DeVitt and Blackmar's Federal Jury Practice and Instructions, 2d Ed. Vol. 2 "Federal Employers' Liability Act" § 89.13 page 335 7

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Janet T. Hamilton, Administratrix of the Estate of Frank Eskel Hamilton, hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on February 14, 1972, which found no error warranting reversal of a judgment denying recovery in a wrongful death action brought under the Federal Employers' Liability Act.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion decided on February 14, 1972, and the trial court's opinion decided on June 2, 1971 are appended hereto in the Appendix. The opinion of the Fourth Circuit has not been officially reported at this time.

JURISDICTION

The order sought to be reviewed was made and entered on February 14, 1972. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was there prejudicial error in a Federal Employers' Liability Act case where a charge to the jury required a railroad employee to prove by a preponderance of the evidence that the railroad's negligence was a proximate cause of the employee's death where proximate cause was defined as at common law?

2. Does the Federal Employers' Liability Act require a charge to provide as a whole that the railroad would be liable if its negligence in whole or in part caused an employee's death?

STATUTES INVOLVED

Section 51 of the Federal Employers' Liability Act provides

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or* husband and children of such em-

ployee; and, if none, then the next of kin dependent upon such employee, *for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency,* due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Italics Ours.) (See 45 U.S.C.A. Section 51 Federal Employers' Liability Act, page 150)

STATEMENT OF THE CASE

Frank Eskel Hamilton, the decedent, was killed during a switching movement on January 8, 1970 while in the course of his employment with the Chesapeake and Ohio Railway. Hamilton left his wife, the petitioner, and four children, the oldest of which was thirteen. The petitioner instituted suit under the Federal Employers' Liability Act in the United States District Court for the Western District of Virginia. The jury returned a verdict for the Chesapeake and Ohio Railway.

Hamilton was a brakeman working at the rear of the east side of a train when it collided with a train parked on a parallel track. Petitioner's evidence showed that you could not work on the east side of the train because of the lack of visibility (App. on Appeal 58, 69, 70, 71, 110 and 131; T. 70-71),[1] that the train was moved in violation of the railroad's rule on the disappearance of a hand signal (App. on Appeal 102, 114; T. 176), that the conductor who was responsible for the movement of the train with the engineer was not participating in the switching movement because he was at a phone box (App. on Appeal 21, 42, 43), and that

[1] Reference will be made in the following manner (App. on Appeal means the printed appendix on appeal. T. means trial transcript, and App. means appendix in petition for certiorari).

the engineer who had control over the movements of the train, moved the train even though he couldn't see any signal from Hamilton or more than a box car or two ahead on a five car train (App. on Appeal 70-72). Evidence of Hamilton's alleged acts of negligence was introduced by the Chesapeake and Ohio Railway. The court then charged the jury as to the negligence of each of the parties with the determining issue being one of causation. However, the court, over the objection of the petitioner (App. 14), charged the jury that the petitioner had to prove that the railroad's negligence was *a proximate cause of the accident complained of; that is, that the accident was the natural and probable consequence of such negligence* and did not convey to the jury as a whole that the railroad was responsible if its negligence contributed in whole or in part or in the slightest degree (Italics Ours).

Initially, at the beginning of the charge, the court did indicate that the railroad would be responsible for its negligence in whole or in part (App. 4, 5) and acceptably defined causation (App. 7a and 8a). However, for the last seven pages of an eleven-page charge, the court charged the jury that the petitioner had to show by a preponderance of the evidence that the negligence of the railroad was a proximate cause of Hamilton's death with proximate cause being defined as at common law.

> "The burden is upon the plaintiff not only to prove by a preponderance of the evidence that the defendant railroad was negligent, but also to prove by a preponderance of the evidence that *such negligence was a proximate cause of the accident complained of that is, that the accident was a natural and probable consequence of such negligence. The railroad is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties which, though*

possible, were wholly improbable. Therefore, even though you may believe from a preponderance of the evidence that the defendant railroad was negligent, yet, unless you *further believe from a preponderance of the evidence that such negligence was a proximate cause of the accident, you must find your verdict in favor of the defendant railroad . . .*" (Italics Ours) (App. 8)

". . . In order for the plaintiff to recover against the defendant railroad in this case, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant railroad was negligent and *that such negligence was a proximate cause of the accident and of his death . . .*" (Italics Ours) (App. 8)

"And even if you believe from a preponderance of the evidence that the defendant railroad was negligent but you are also unable to *determine whether such negligence was a proximate cause of the accident, or if you believe that it is just as probable that such negligence was not a proximate cause of the accident as that it was, then you still cannot find a verdict for the plaintiff and you must return* your verdict in favor of the defendant railroad . . ." (Italics Ours) (App. 9)

"Was the negligence of the defendant railroad company a proximate cause of the accident?" (If your unanimous answer to that question is "no" you will return a verdict for the defendant . . .) (App. 10)

". . . first determine the full amount of damages sustained by plaintiff, as a proximate result of the accident . . ." (App. 10)

"But then the third thing is that if you find that both were at fault, then you set down in your deliberate wisdom, with fairness and justice to all people, without guessing, without being influenced by any bias of any kind, because we, as jurors and as judges, we have no friends, and we have no enemies in the administration of justice, and then come up with what you think the proper decision in the case." (App. 13)

REASONS FOR GRANTING WRIT

The Courts' application and interpretation of causation is of vital importance to hundreds of thousands of railroad employees throughout the United States. The subject of causation under the Federal Employers' Liability Act has experienced voluminous litigation throughout the State and Circuit Courts of Appeals of the country.[2] In *Tyree* v. *New York Central Railroad Company*, 382 F.2d 524, 529 (6th Cir. 1967) cert. denied 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967) the court said:

> "It would be better in Federal Employers' Liability Act cases if no mention of proximate cause whatever was made to the jury and following the views of the Supreme Court as expressed in *Rogers* v. *Missouri Pacific R. Co., supra*, that the jury be instructed on the subject of causation to the effect that if an employer's negligence played any part, even the slightest, in producing the injury, the employer is liable in damages . . ."

See also *Edison* v. *Atchison, Topeka and Santa Fe Railway Company*, 453 P. 2d 204 (1969). This view has been extended and the approved instruction for causation in Federal Employers' Liability Act cases makes no reference to proximate cause.

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[2] *Parker* v. *Atchison, Topeka and Santa Fe Railway Company*, 70 Cal. Rptr. 8 (1968), *Edison* v. *Atchison, Topeka and Santa Fe Railway Company*, 453 P.2d 204 (1969), *Hoyt* v. *Central Railroad*, 243 F.2d 840 (3rd Cir. 1957), *DeLima* v. *Trinidad Corporation*, 302 F.2d 585 (2nd Cir. 1962), *Page* v. *St. Louis Southwestern Railway Company*, 312 F.2d 84 (5th Cir. 1963), *Tyree* v. *New York Central Railroad Company*, 382 F.2d 524 (6th Cir. 1967) cert. denied 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967), *Haysrath* v. *New York Central Railroad Company*, 401 F.2d 634 (6th Cir. 1968), *Ely* v. *Reading Co.*, 424 F.2d 758 (3rd Cir. 1970), *Stacy* v. *Sea-Drilling Corp.*, 424 F.2d 1272 (5th Cir. 1970).

> "For purposes of this action injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission."
>
> "Stated another way, an act or omission is the cause of the injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes." *DeVitt and Blackmar's Federal Jury Practice and Instructions*, 2d Ed. Vol. 2 "Federal Employers' Liability Act" § 89.13, page 335.

The petitioner submits that the Fourth Circuit Court of Appeals' decision here in finding no error in the charge to warrant reversal is a departure from the provisions of the Federal Employers' Liability Act and the decisions of this Court. Section 51 of the Federal Employers' Liability Act as passed by Congress provides that the railroad

> "shall be liable in damages to any person . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . ."

The Supreme Court in the landmark case of *Rogers* v. *Missouri Pacific Railroad Company*, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) held

> "The statute expressly imposes liability upon the employer to pay damages for injuries or death due in whole or in part to its negligence." *Rogers, supra*, 507

> "The employee is stripped of his common law defenses and for practical purposes the inquiry of these cases today rarely presents more than the single question whether the negligence of the employer played any part, however small, in the injury or death which is the subject of this suit." *Rogers, supra,* p. 508

More recently this court again in *Crane* v. *Cedar Rapids and Iowa City Railway,* 395 U.S. 164, 166, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969) made it clear that proximate causation was not a part of the Federal Employers' Liability Act when it held that

> "Under the Federal Employers' Liability Act, an employee is not required to prove common law proximate causation, but only that his injury resulted in whole or in part from the railroad's violation."

Moreover, the petitioner submits that the court's approval of the charge here is not consistent with the decisions of other Circuit Courts of Appeal.

In *Hausrath* v. *New York Central Railroad,* 401 F.2d 634 (6th Cir. 1968) the Sixth Circuit Court of Appeals concluded

> "Since Congress has deliberately established a more protective principle for railroad employees than that of the common law, it is reversible error for a judicial charge to fail to employ and emphasize both the 'in whole or in part' causal language of the statute and the interpretative language of the Supreme Court in the *Rogers* case." *Hausrath, supra,* p. 638.

In *Page* v. *St. Louis Southwestern Railway Company,* 312 F.2d 84, 92 (5th Cir. 1963) the jury was instructed that the burden was on the plaintiff to prove that the defendant was guilty of negligence and that such negligence was a proxi-

mate cause of the accident after the jury had been instructed on common law proximate cause. The Fifth Circuit Court of Appeals held that the charge was erroneous in that

> "The jury was required to find before the plaintiff could prevail that the cause of his injury was one which in natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred . . ." *Page, supra,* p. 92
>
> "We must hold that the Court's instructions on proximate causation were erroneous in operating to unduly restrict the jury in the exercise of its functions." *Page, supra,* p. 92

In *DeLima* v. *Trinidad Corporation,* 302 F.2d 585, 588 (2nd Cir. 1962) the second Circuit Court of Appeals in a Jones Act case which is interpreted like the Federal Employers' Liability Act held it error to give a charge that

> "Proximate cause is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which it would not have occurred." *DeLima, supra,* 588

Finally, in *Hoyt* v. *Central Railroad,* 243 F.2d 840 (3rd Cir. 1957) the Third Circuit Court of Appeals held, that although at the outset of the charge the trial Judge instructed that an employee is entitled to recover if the railroad's negligence is responsible in whole or in part, the charge "as a whole gave the jury the impression that the negligence of the railroad had to be the sole proximate cause of the plaintiff's injury."

CONCLUSION

It is the contention of the petitioner that the judicial charge required the petitioner to prove common law proximate cause i.e.—that the negligence of the Chesapeake and Ohio Railway was a natural and probable consequence of Hamilton's death, and that this charge imposed on the petitioner a more stringent burden of proof than is required by *Rogers, supra, Crane, supra,* and Section 51 of the Federal Employers' Liability Act. Even though there was some acceptable language as to causation, the jury's role was restricted in that the charge as a whole did not convey to them that the employee is entitled to recover if employer negligence played any part, even the slightest, in producing the injury. Federal District Courts, Circuit Courts, and State Courts throughout the United States need guidance from the United States Supreme Court on this paramount issue and this Court should once and for all resolve the conflicts and end the litigation in the application and interpretation of causation under the Act in order to insure the uniform and orderly administration of the Federal Employers' Liability Act for hundreds of thousands of railroad employees and their families.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided February 14, 1972

Per Curiam:

Upon consideration of the briefs, record, and oral argument, we find no error warranting reversal of the judgment denying recovery in this action brought under the Federal Employers' Liability Act.

Affirmed.

OPINION OF TRIAL COURT

Rendered June 2, 1971

[Tr. pp. 369-371]

The Court: Go ahead and state them.

Mr. Moody: Well, we would move, Your Honor, to set the verdict aside, and, of course, the grounds would be based on the evidence that was granted, some that was refused, which I would not attempt to at this moment go into, (If I may, I would like an opportunity to present that.) in addition to the instructions to the jury, one of which counsel objected to, and as being contrary to the law and evidence in the case.

The Court: I think that covers it all. In other words, Senator, your motion is to set aside the verdict as contrary to the law and the evidence and to grant a new trial, and then I will give you an opportunity to put your reasons in writing.

But in accordance with my views, I always let the jury know how I feel about their decisions. I have followed that in the ten years that I have been judge, and I think it is most satisfactory, and instead of their going away wondering whether it will be set aside by the presiding judge or not, I

always try to let them know, and I try to let them know right after the trial, after the verdict comes in, because I know more about the case then than I'll ever know any other time.

I overrule your motion to set aside the verdict and decline to grant it, because I feel that the jury's verdict, although it was very heart pulling to have to decide it that way, when you look at the widow and the four children, yet, I feel that the decision is one that is the right and the justice of the case, and I say that not with any disrespect towards the deceased, and I know that the jury feels, as I feel, a sympathetic heart toward the family. Yet, on the other hand, I think that the preponderance of the evidence showed to the Court, showed to the jury and to the Court, that unfortunately the decedent made about four mistakes that resulted in his death, in that he threw the wrong signal; he didn't inspect it after throwing it to see that the mistake was made as the rules provide; he gave the signal to back up; and he rode the train that he should have been stopping, that he was in a position to know; and I think that all told that the evidence preponderated in that way. I am sorry for the widow and the children, but we are not here to determine cases upon our sympathies or what our hearstrings may pull us to do, but we are here to do, through the administration of justice, that which we think is the right and the justice of the case. So I have to overrule it. I hate to do it, but that is the way I feel about it. If per chance, you see anything in the record that would indicate and aid you in your appeal, I will be delighted for you to do it. Senator. I must say that you and your associate, Mr. Miller, have certainly presented the case as forcefully, as any able attorneys could do. You have no apologies to make on the wonderful presentation that you made of the case, but the factual situation, I think, overwhelmingly supports the jury verdict.

* * *

Thank you all for the splendid attention that you have given to the case. You have followed it very attentively. So has the Court. It is all in the record, and it has been an important case and a very long and hard-fought decision, and it is ended, and it is a case in which I say over and over again, that our sympathies may be one way, but our hearts and our minds and our consciences tell us that the facts are the other way.

* * *

THE CHARGES OF THE COURT

[Tr. pp. 337-353]

The Court: Ladies and gentlemen of the jury, this is a suit for wrongful death which arises under the Federal Employers' Liability Act, an act passed by Congress which governs the right of railroad workers and their families to recover for injuries or death sustained by railroad employees in the course of their employment. Under that act, the railroad-employer has a nondelegable duty to furnish its employees with a safe place to work. This duty applies wherever such employees are required to work, even though it is on the property of another railroad. If, under the circumstances of this case, you find that the railroad failed to furnish Mr. Hamilton with a safe place to work and that his death resulted in whole or in part from such failure, then you must find for the plaintiff and against the defendant railroad.

In this case the deceased did not assume the risk or danger of any unsafe place to work, as this defense has been completely and wholly abolished by the Federal Employers' Liability Act; nor did he assume the risk of any negligence on the part of the railroad company or its officers or employees; nor did he assume the risk of any failure by the

defendant railroad company to furnish him a safe place in which to perform his duties. In these respects, therefore, if you believe from the evidence that Frank Hamilton was killed as a result of the negligence of the defendant railroad company, either in whole or in part, then he cannot be held to have assumed these risks, and if you believe from the evidence that such conditions existed which contributed to his death, then the plaintiff is entitled to recover damages from the defendant railroad company in accordance with the further charges of this Court.

If you believe from a preponderance of the evidence that the railroad, through fellow employees of the deceased, violated any of the written rules of the railroad, promulgated by the railroad for the safety of its employees, this was negligence on the part of the defendant railroad company, and if you should further believe that such negligence, if any contributed to cause or contributed to the death of Frank Hamilton, your verdict shall be for the plaintiff.

It is a legal presumption that the deceased, Mr. Hamilton, exercised reasonable care for his own safety, and in the absence of proof to the contrary, it must be presumed that at the time of the death he was acting with due care for his own safety.

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case, but the jury has no right to arbitrarily disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent

candor or fairness; his bias, if any; his intelligence, his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

It was the continuing duty of the defendant, as an employer, at the time of the accident in question, to use ordinary care in furnishing the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain such place in a reasonably safe condition. This does not mean that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, and to see that the place in which the work is to be performed is reasonably safe.

Section 4 of the Federal Employers' Liability Act provides in part that:

> "In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In order to prove the essential elements of plaintiff's case, the burden is upon the plaintiff to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendant was negligent in one or more of the par-

ticulars alleged; and second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury. So if you find from the evidence that any negligence on the part of the defendant contributed in any way or manner toward any injury suffered by plaintiff, you may find that injury was proximately caused by defendant's act or omission.

This does not mean that the law recognizes only one proximate cause of an injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause an injury; and in such a case, each may be a proximate cause.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges, as an affirmative defense, that contributory negligence on the part of the plaintiff was a proximate cause of any injuries which the plaintiff may have sustained.

Contributory negligence is fault on the part of a person injured which, cooperating in some degree with the negligence of another, helps in bringing about the injury.

The burden is on a defendant alleging the affirmative defense of contributory negligence to establish, by a preponderance of the evidence in the case, the claim that the plaintiff was negligent, and that such negligence was a proximate cause of any injuries which the plaintiff may have sustained.

Section 3 of the Federal Employers' Liability Act, provides in part, and I quote:

"In all actions . . . brought against any . . . common carrier by a railroad . . . to recover damages for personal injury to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

So if you find that the defendant was guilty of negligence which proximately caused any injuries to the plaintiff, and further find that the plaintiff was guilty of some negligence which proximately contributed to his injuries, then the total damages awarded the plaintiff must be diminished or reduced by you in the proportion that the amount of contributory negligence chargeable to the plaintiff compares to the amount of negligence chargeable to the defendant.

On the other hand, if you should find: (1) that the defendant was not negligent; or (2) that the defendant was negligent, but such negligence was not a proximate cause of any injuries sustained by the plaintiff; or (3) that the negligence of the plaintiff was the sole—the only—proximate cause of any injuries which plaintiff has sustained as a proxiresult of the accident, then your verdict should be for the defendant.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's own person or property.

Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property, or to the persons or property of others.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in light of all the circumstances, as shown by the evidence in the case.

The term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury.

The burden is upon the plaintiff not only to prove by a preponderance of the evidence that the defendant railroad was negligent, but also to prove by a preponderance of the evidence that such negligence was a proximate cause of the accident complained of; that is, that the accident was a natural and probable consequence of such negligence. The railroad is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties which, though possible, were wholly improbable. Therefore, even though you may believe from a preponderance of the evidence that the defendant railroad was negligent, yet, unless you further believe from a preponderance of the evidence that such negligence was a proximate cause of the accident, you must find your verdict in favor of the defendant railroad.

The Court instructs the jury that the mere fact that there was an accident and that Frank Hamilton was killed does not of itself entitle the plaintiff to recover in this case. In order for the plaintiff to recover against the defendant railroad in this case, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant railroad was negligent and that such negligence was a proximate cause of the accident and of his death.

And if the jury is unable to determine whether any such negligence of the railroad has been so proven by a prepond-

erance of the evidence, or if you believe that it is just as probable that the defendant railroad was not guilty of any such negligence as that it was, then you must return your verdict in favor of the defendant.

And even if you believe from a preponderance of evidence that the defendant railroad was negligent but you are also unable to determine whether such negligence was a proximate cause of the accident, or if you believe that it is just as probable that such negligence was not a proximate cause of the accident as that is was, then you still cannot find a verdict for the plaintiff and you must return your verdict in favor of the defendant railroad.

The Court tells you that while it was the railroad's duty as employer to furnish Hamilton a reasonably safe place in which to perform his duties, that does not mean that the railroad was guarantor or insurer of the safety of the place to work. It only means that it should exercise that exact same degree of ordinary care to see that the place of work was safe as Hamilton was required to exercise for his own safety in working in that place.

The Court tells you that if you believe from all the evidence in this case that the sole cause of the accident was the alleged negligence of Hamilton, then you cannot find a verdict for the plaintiff, and you must find your verdict for the defendant railroad.

The Court instructs the jury that you must consider this case solely on the evidence submitted to you and the law laid down in charge of the Court, and that you must not base your verdict in any part on conjecture, surmise or sympathy.

The issues to be determined by the jury in this case are these:

First: Was the defendant railroad negligent in one or more of the particulars alleged?

If your unanimous answer to that question is "no," you will return a verdict for the defendant; but if your unanimous answer is "yes," then you have a second issue to determine, namely:

Second: Was the negligence of the defendant railroad company a proximate cause of the accident?

If your unanimous answer to that question is "no," you will return a verdict for the defendant; but if your unanimous answer is "yes," then you must find the answer to a third question, namely:

Third: Was Hamilton guilty of some contributory negligence?

If you find that he was not, then, having found an affirmative answer to the first two questions, you will proceed to determine the amount of the plaintiff's damages, and return a verdict for the plaintiff for that amount.

On the other hand, if you should find, from a preponderance of the evidence in the case that Hamilton, himself, was guilty of some contributory negligence, and that his fault was a proximate cause of the accident, then you must compare the negligence of the railroad and the negligence of Hamilton and return a verdict in favor of the plaintiff for a reduced amount, based upon that comparison.

The proper procedure to be followed by the jury in comparing the negligence of the railroad and the negligence of Hamilton and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison is: first, determine the full amount of damages sustained by plaintiff, as a proximate result of the accident; next, compare the negligence or fault of the railroad and that of Hamilton by determining in what proportion, figured in percentage, Hamilton's own fault contributed as a proximate cause of the accident; then, reduce the full amount of plaintiff's

damages, by subtracting a sum equal to the percentage of the total you find, from a preponderance of the evidence in the case, was caused by Hamilton's contributory negligence; and return a verdict in favor of the plaintiff for the amount remaining.

The Court instructs the jury, that in the event the defendant is liable in this case to plaintiff, then the other question for you to determine—Strike that out, please. I will come back and give another instruction. Disregard the foregoing part of that. I will reach that in a moment.

The Court charges the jury that based upon the evidence you may award Janet T. Hamilton such sums as would reasonably compensate her for the pecuniary loss she sustained by the reason of her husband's death. In determining the amount which decedent might have reasonably expected to contribute to her support, the jury should consider the age of the deceased, the condition of his health, his earning capacity, his life expectancy, and his disposition to contribute, to care for, to furnish money as shown by the evidence.

The Court charges the jury that each child is entitled to recover for the pecuniary loss sustained by reason of the decedent's death. This pecuniary loss is based upon the benefit which the children would have received until each child attained the age of twenty-one and goes beyond considerations of support, food, shelter, clothing, and like material comfort, and includes the right to compensation for the lack of nurture, training, advice, guidance, and educational, religious, moral, intellectual and physical training as the evidence shows deceased would have provided had he lived.

The clerk has prepared two forms of verdict. When you go to your jury room, you will select one of your members as foreman, who will preside over your deliberations and will sign and return the verdict. The verdict must be a

unanimous one. The Clerk has prepared here, under the directions of the Court, two forms of verdict. One is with the style of the case, "We, the jury, find for the defendant, The Chesapeake and Ohio Railway Company." The other one is with the style of the case, "We, the jury, find for the plaintiff, Janet T. Hamilton, Administratrix of the Estate of Frank Eskel Hamilton, deceased, and fix damages in the sum of [blank] dollars, and direct that the recovery be distributed to the widow and children as follows: Janet T. Hamilton . . ." There is a dollar mark to fill in, and then each of the four children have a dollar mark for you to fill in, in the event you find for the plaintiff.

Now I might elaborate just a moment by way of summary of what these instructions have said.

First, I have given you definitions as to preponderance of the evidence, as to contributory negligence, as to the burden of proof, proximate cause and other matters. But then, essentially the case gets down to this: In one event, that if you find that the railway company was not at fault, and that the accident resulted from the sole negligence of Mr. Hamilton, then you sign the first form of verdict, which would be that you find for the railway company.

The next situation is that if you find that there was contributory negligence on the part of Mr. Hamilton in contributing to the accident, and in the event that you find that the railway company was negligent, then you seek to first determine what you would allow the plaintiff if the railroad alone were negligent, and then you would figure, well, what percentage of this is it to be reduced by reason of the negligence, if proven, of Mr. Hamilton, and from that you would determine your verdict.

There is one other thing, I don't think it is mentioned. But if you come to that point, you would also have to take

into consideration reducing the verdict to its present value. That is, where someone pays off money now, which you have figured for use over a number of years, that money is worth something in the meantime, and so the amount that you reach has to be reduced to whatever is its present value.

Now I do not wont to be in a position of trying to give you figures, because I do not know how you may react to the case, because the evidence has been presented to you to determine the facts. The Court seeks as best it can to preside over the trial and to give you the law that is applicable to the case, which I think is pretty fully covered, and is really not complicated in any event. But that, I think, gives you the general idea, and I repeat: First, if you find the railroad was not at fault; they are out. If you find that they were at fault, and that Mr. Hamilton was not at fault, then the verdict should be against the railroad for whatever amount you think is proper. But then the third thing is that if you find that both were at fault, then you set down in your deliberate wisdom, with fairness and justice to all people, without guessing, without being influenced by any bias of any kind, because we, as jurors and as judges, we have no friends, and we have no enemies in the administration of justice, and then come up with what you think is the proper decision in the case.

I am going to excuse you to go out into your jury room with the marshal. You may elect your foreman, but before starting your deliberations, I want to check with counsel to see whether anything has been omitted by way of instructions to you, as the rules of Federal Court require. You all may retire.

(At 2:53 P.M. the jury retired to the jury room.)

* * *

OBJECTIONS OF THE PLAINTIFF

The Court: Let the record show that out of the presence of the jury, the Court inquired of counsel whether there were any objections to the instructions as given by the Court to the jury. Does the plaintiff wish to go first?

Mr. Miller: Yes, Your Honor. I again specifically point out—I don't know the number of the instructions, but during the course of your instructions to the jury on the proximate cause of this accident, you referred to the proximate cause of the railroad. Well, Your Honor, may I point out that the Supreme Court has said many, many times, *Rogers* v. *Missouri Pacific,* that proximate cause is really not the test in F.E.L.A. cases. Negligence—If the railroad was negligent, and it played any part, no matter how slight, or contributed in any degree to the accident, then the plaintiff is entitled to recover.

The Court: All right. Now let me answer you, Mr. Miller. This instruction was read verbatim, 13.12, from "Jury Instructions and Forms for Federal Civil Cases," gotten out by the Honorable William C. Mathes, and it does incorporate the language that you are talking about. It says, "contributed in any way or manner toward the injury." You may look at it and see if it covers your objection.

Mr. Miller: Okay. We would like to object, because we would want to have it, "in whole or in part or that contributed in the slightest degree." We would like to have that language in the proximate cause aspect. With that just one objection, Your Honor, we have no further objections.

SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1971

No. 71-1460

JANET T. HAMILTON, ADMINISTRATRIX OF THE ESTATE OF FRANK ESKEL HAMILTON, DECEASED,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

JURISDICTION 1

QUESTION FOR REVIEW 1

RESTATEMENT OF THE CASE 2

THERE IS NO REASON FOR GRANTING THE WRIT IN THIS CASE 3

THE CHARGE IN THIS CASE 6

CONCLUSION 9

TABLE OF CITATIONS

Cases

Baltimore and Potomac R. Co. v. Mackey, (1894), 157 U.S. 72, 39 L. Ed. 624, 15 S. Ct. 491 8

Crane v. Cedar Rapids and Iowa City Railway Company (1969), 395 U.S. 164, 23 L. Ed. 2d 176, 89 S. Ct. 1706 3

DeLima v. Trinidad Corporation (C.A. 2-1962), 302 F. 2d 585 6

Ely v. Reading Company (C.A. 3-1970), 424 F. 2d 758 6

Hausrath v. New York Central Railroad Company (C.A. 6-1968), 401 F. 2d 634 5

Hoyt v. Central Railroad (C.A. 3-1957), 243 F. 2d 840 5

Magnum Co. v. Coty (1923), 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531 4

Page v. St. Louis Southwestern Railway Company (C.A. 5-1963), 312 F. 2d 84 5

Petapsco Ins. Co. v. Southgate, 30 U.S. 604, 8 L. Ed. 243 8

Rogers v. Missouri Pacific Railroad Company (1957), 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 3

Page

Stacey v. Sea-Drilling Corporation (C.A. 5-1970), 424 F. 2d 1272 .. 6

Tyree v. New York Central Railroad Company (C.A. 6-1967), 382 F. 2d 524, cert. denied 389 U.S. 1014, 19 L. Ed. 2d 659, 88 S. Ct. 589 4

Other Authorities

Mathes and Devitt, Federal Jury Practice and Instructions, § 84.12, p. 517 ..... 4, 7

53 Am. Jur., Trial, § 842, p. 618 8

45 U.S.C. § 54, p. 114 7

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BRIEF IN OPPOSITION

JURISDICTION

The jurisdiction of this Court is admitted, but it is clear that it should not be exercised in this case.

QUESTION FOR REVIEW

There is only one question that could be reviewed: Whether the charge in this case correctly stated as a whole the respondent's liability for negligence under the Federal Employers' Liability Act.

That it did so will be obvious.

RESTATEMENT OF THE CASE

The charge in this case (to be examined in detail later in this brief) meets all of the requirements of the Federal Employers' Liability Act.

It is without contradiction in the evidence presented that negligence of the petitioner's decedent was the sole cause of his death. That is the only conclusion that can be drawn from the evidence. The jury and the trial court both so found[1] and the Fourth Circuit Court of Appeals affirmed.[2]

Hamilton was the rear brakeman on the pre-arranged switching movement at Doswell, Virginia, bringing five stone cars out of the RF&P wood chip track on to the lead track in order to back up at the north wye switch on the north wye track to the C&O main line for travel thereon east to Richmond.[3]

In that movement it was Hamilton's responsibility to position the switch so that the train moved in the direction intended.[4] It was also Hamilton's responsibility to check the switch points after he threw the switch to verify that the points were correctly lined so that the train would move in the proper direction before he gave the signal for the back-up movement.[5] It was further Hamilton's duty on the

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[1] App. pp. 1-3; App. on Appeal, pp. 18-20. We adopt the petitioner's method of reference. See petition, footnote 1. Nine copies of the Joint Appendix on Appeal have been filed by respondent with this brief.

[2] App. p. 1.

[3] A free-hand sketch of the track lay-out at the Doswell interchange is attached to this brief. It is not drawn to scale but is copied generally from Court Exhibit No. 1 and Defendant's Exhibit No. 6 of the Record solely for the Court's convenience.

[4] Operating Rule No. 104: "The employee handling the switch or derail is responsible for the position of such switch or derail . . ." App. on Appeal, pp. 51-54.

[5] Operating Rule No. 104-B: "Before giving hand signals for movement and when restoring switches to normal position, employees lining switches must see that the route is properly lined; switch points fit properly; derails are properly lined; and switches and derails are properly secured." App. on Appeal, pp. 54-55.

rear car to keep a lookout to see that the train did not collide with cars, locomotives or trains on an adjacent track.[6]

It is uncontradicted that Hamilton threw the wrong switch and that consequently the train, on the rear car of which he rode, went left at the south cross-over switch instead of right at the north wye switch and collided with the second engine of the train standing on No. 4 Passing Track, resulting in Hamilton's death. Petitioner's counsel conceded that he did exactly that at page 18 of her brief in the Fourth Circuit Court of Appeals. In the trial court, counsel argued to the jury:

> "The only way that he (Hamilton) could be denied recovery would be if the only mistake in this whole thing was one that he made, and I say to you, the burden is on them to prove that he made the mistake."[7]

The verdict and judgment below were the only verdict and judgment possible on the facts of this case.

THERE IS NO REASON FOR GRANTING THE WRIT IN THIS CASE

The law as to what constitutes a jury issue in Federal Employers' Liability Act cases is settled and established. The many decisions of this Court from *Rogers* v. *Missouri Pacific Railroad Company* (1957), 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 through *Crane* v. *Cedar Rapids and Iowa City Railway Company* (1969), 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176, leave for decision no unsettled questions on that subject of importance.

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[6] Safety Rule 182: "Employees will maintain a lookout in the direction of movement to avoid coming in contact with structures or obstructions along side of track or with cars, locomotives, or trains on adjacent track." App. on Appeal, pp. 55-56.

[7] App. on Appeal, pp. 3-4.

The following observation by Chief Justice Taft in *Magnum Co.* v. *Coty* (1923), 262 U.S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531, 532, still applies to cases like this one:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The Courts of Appeal of the several circuits are not in conflict on the application or interpretation of the Federal Employers' Liability Act with respect to proof of causation. The decisions cited by the petitioner so establish and none of them is in conflict with the decision of the Fourth Circuit Court of Appeals in this case.

Especially in point and supporting respondent's position is *Tyree* v. *New York Central Railroad Company* (C.A. 6-1967), 382 F. 2d 524, first cited by the petitioner. In *Tyree* judgment for the railroad on a jury verdict was affirmed notwithstanding that the charge contained "language embodying the traditional concept of proximate causation." Proximate cause was there defined as the direct cause and as that cause "which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which it would not occur." 382 F. 2d at 527. The trial court refused the specific definition of proximate cause given in Hamilton's case from Mathes and Devitt's *Federal Jury Practice and Instructions*, § 84-12, p. 517. App. on Appeal, pp. 6-7. Such refusal was the chief claim of error on that appeal.

The Sixth Circuit affirmed the defendant's judgment on the ground that the charge in *Tyree* contained, as does the charge in Hamilton's case, "repeated instructions on proximate cause which fully complied with the statute." This Court denied certiorari. 389 U.S. 1014, 19 L. Ed. 2d 659, 88 S. Ct. 589 (1967).

The concurring comment by Chief Judge Weick is quite significant in relation to the facts in Hamilton's petition:

> ". . . Plaintiff may not recover if his own negligence was the sole proximate cause of his injury. Neither may plaintiff recover where there was negligence on the part of the defendant if that negligence was not a proximate cause of such injury." 382 F. 2d at 530.

Hausrath v. *New York Central Railroad Company* (C.A. 6-1968), 401 F. 2d 634, is not in any respect in point. In contrast to a single mention of "in whole or in part" the charge in that case made some fifteen references to "*the* proximate cause," or "*the* direct cause" and "*the* real cause." The reversal in that case was based on the finding that, even in non-FELA negligence cases, the plaintiff was not required to prove that defendant's negligence was the *sole* proximate cause. 401 F. 2d 636, 637 and 638.

Hoyt v. *Central Railroad* (C.A. 3-1957), 243 F. 2d 840, like *Hausrath*, above, was reversed because the charge required the plaintiff to prove that defendant's negligence was the *sole* proximate cause of the injury. On something more than five occasions the charge referred to "*the* proximate cause." The ground of reversal was thus stated:

> "The instructions as a whole gave the jury the impression that any negligence on the part of the defendant had to be the sole proximate cause of the plaintiff's injury in order to hold the defendant liable. This was prejudicial error." 243 F. 2d at 843.

In *Page* v. *St. Louis Southwestern Railway Company* (C.A. 5-1963), 312 F. 2d 84, the charge contained no reference whatever to "in whole or in part." Obviously, there is no relevancy of that decision to the charge in Hamilton's case.

The charge in *DeLima* v. *Trinidad Corporation* (C.A. 2-1962), 302 F. 2d 585, contained the common law definition of proximate cause quoted at page 9 of the petition. In that case the trial court refused to charge the jury that "if the employer's negligence 'played any part, even the slightest, in producing an injury to plaintiff, the plaintiff may recover.'" 302 F. 2d at 587. The charge included only the definition quoted by petitioner. Like *Page*, above, the charge did not include any reference whatever to "in whole or in part." Moreover, the judgment in *DeLima* was reversed on numerous other grounds.

Ely v. *Reading Company* (C.A. 3-1970), 424 F. 2d 758, cited but not commented on by petitioner, also affirmed judgment for the defendant on a jury verdict in a death case notwithstanding that the charge required negligence to be the proximate cause of the accident when the charge also directed a plaintiff's verdict, if the death "resulted in whole or in part from the employer's negligence." 424 F. 2d at 762.

Stacey v. *Sea-Drilling Corporation* (C.A. 5-1970), 424 F. 2d 1272, also cited but not commented on, and arising under the Jones Act, found no reversible error in reference to proximate cause with respect to burden of proof when the charge in other parts stated that there was liability if negligence "played any part, even the slightest."

This petition for certiorari presents for decision no issue of national importance not heretofore fully decided and no conflict of decision whatever. The petition merely seeks another hearing on the facts of this particular case, with which this Court, we submit, is not concerned.

THE CHARGE IN THIS CASE

Petitioner concedes that "the court did indicate that the railroad would be responsible for its negligence in whole or

in part (App. 4, 5) and acceptably defined causation (App. 7a and 8a)." Petition, p. 4.

That concession, however, does not adequately or fairly convey the initial and repeated emphasis of the charge that the plaintiff must recover if Hamilton's death resulted "in whole or in part from such failure" to furnish a safe place to work; again, if "Hamilton was killed as a result of the negligence of the defendant railroad company, either in whole or in part"; and again, "if you should further believe that such negligence, if any, contributed to cause or contributed to the death of Frank Hamilton." App. 3-4; App. on Appeal, 4-5.

The charge also quoted in its applicable parts Sec. 54 of the Federal Employers' Liability Act, absolving the plaintiff from assumption of risk where injury "resulted in whole or in part from the negligence of any officers, agents, or employees of such carrier." 45 U.S.C. § 54. App. 5; App. on Appeal, 6.

The first mention of proximate cause occurs in the statement of the burden of proof: first, to prove negligence, and, second, that such negligence "was a proximate cause of any injuries and consequent damages sustained."[*]

This mention of proximate cause is immediately followed by the definition of proximate cause taken from Mathes and Devitt, *Federal Practice and Instructions*, § 84-12, p. 517 which is conceded by petitioner to have "acceptably defined causation" (Petition, p. 4):

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission *played any part, no matter how small*, in actually bringing about or causing the injury. So if you find from the evidence that *any negligence* on the part of

[*] There is no restriction to *the* proximate cause.

> the defendant *contributed in any way or manner* toward any injury suffered by plaintiff, you may find that injury was proximately caused by that defendant's act or omission." App. 6; App. on Appeal, pp. 6-7. Italics supplied.

The charge also later states, but once only, that proximate cause means "that the accident was a natural and probable consequence of such negligence." App. 8; App. on Appeal, p. 9. That is a completely correct statement and is in no way either a limitation upon or inconsistent with any requirement of the Federal Employers' Liability Act.

The charge concludes with a summary, expressly predicated upon the trial court's prior "definitions as to preponderance of the evidence, as to contributory negligence, as to the burden of proof, proximate cause and other matters," as follows:

> ". . .: First, if you find the railroad was not at fault; they are out. If you find that they were at fault, and that Mr. Hamilton was not at fault, then the verdict should be against the railroad for whatever amount you think is proper. But then the third thing is that if you find that both were at fault, then you set down in your deliberate wisdom, . . . and then come up with what you think is the proper decision in the case." App. 12, 13; App. on Appeal, pp. 13, 14.

The charge must be considered as a whole.* The charge does not in any respect fail to convey the standard for recovery fixed by the Federal Employers' Liability Act.

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* *Petapsco Ins. Co.* v. *Southgate*, 30 U.S. 604, 621, 8 L. Ed. 243, 250; *Baltimore and Potomac R. Co.* v. *Mackey* (1894), 157 U.S. 72, 86-87, 39 L. Ed. 624, 629, 15 S. Ct. 491, 495; 53 Am. Jur., Trial, Sec. 842, p. 618.

CONCLUSION

The charge in this case did convey to the jury "that the employee is entitled to recover if employer negligence played any part, even the slightest, in producing the injury," as petitioner phrases the requirement in the conclusion of her petition.

Certiorari should be denied.

Respectfully submitted,

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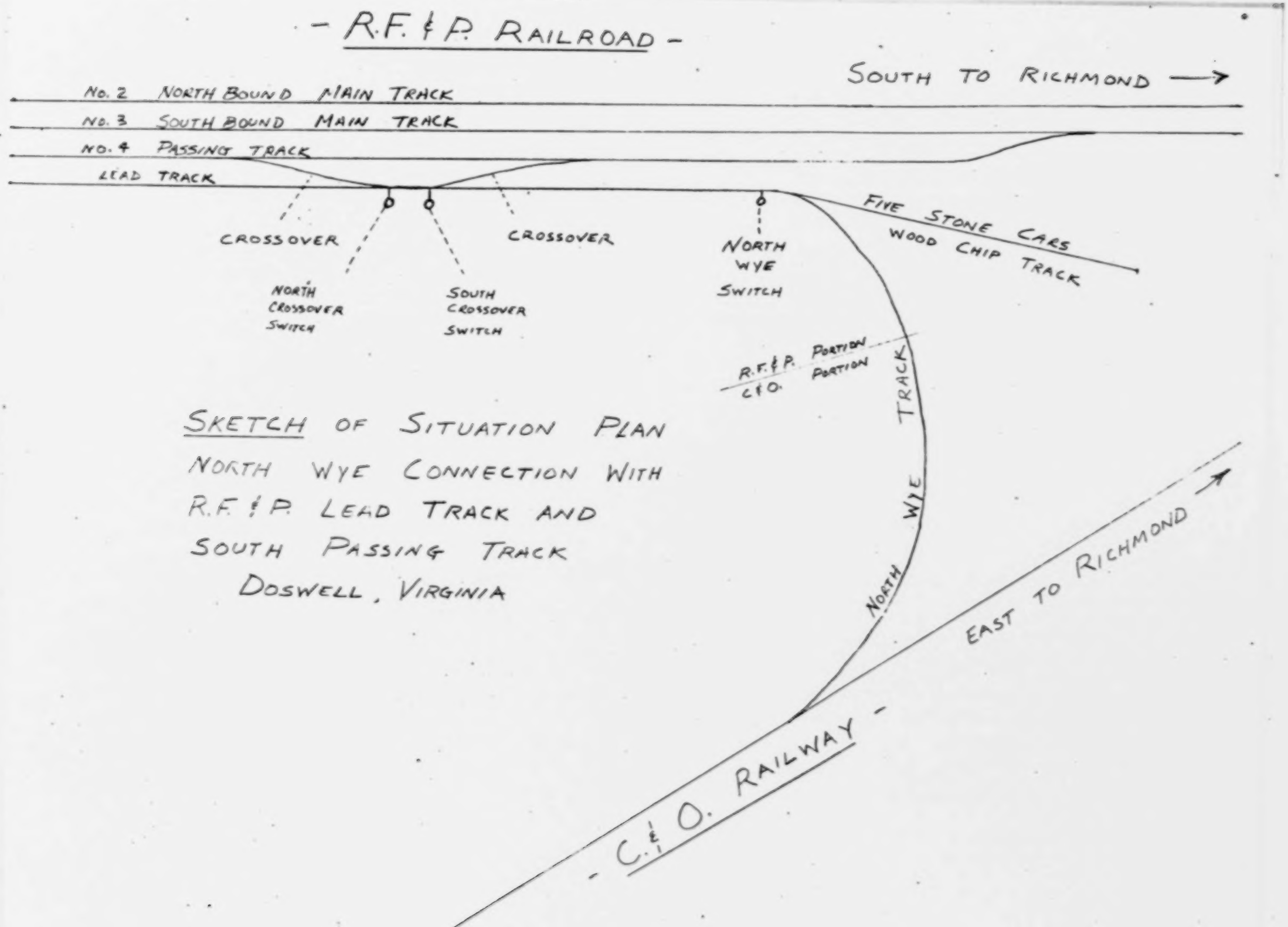
- R.F. & P. RAILROAD -
SOUTH TO RICHMOND →
No. 2 NORTH BOUND MAIN TRACK
No. 3 SOUTH BOUND MAIN TRACK
No. 4 PASSING TRACK
LEAD TRACK
CROSSOVER
CROSSOVER
NORTH CROSSOVER SWITCH
SOUTH CROSSOVER SWITCH
NORTH WYE SWITCH
FIVE STONE CARS
WOOD CHIP TRACK
R.F. & P.
C & O.
PORTION
PORTION
NORTH WYE TRACK
EAST TO RICHMOND
- C. & O. RAILWAY -
SKETCH OF SITUATION PLAN
NORTH WYE CONNECTION WITH
R.F. & P. LEAD TRACK AND
SOUTH PASSING TRACK
DOSWELL, VIRGINIA